

# **GUARDIANSHIP AND CONSERVATORSHIP**



## GUARDIANSHIP & CONSERVATORSHIP

If an individual does not plan ahead regarding their personal care, medical care, and financial matters, and that person becomes incapacitated and unable to make decisions for themselves, then a court must step in and appoint a guardian and/or conservator to make those decisions and handle those matters. With proper planning, including talking with family, friends, and physicians, and by utilizing durable powers of attorney and/or living wills, guardianships can almost always be avoided even when someone is completely incapacitated and unable to care for themselves.

**Conservatorship** A conservatorship is a court-ordered protective relationship whereby an individual is appointed to manage another person's (the ward's) financial affairs after that person has become unable to do so. A petition must be filed with the court and a judge must decide if the assets of the ward are at risk for mismanagement. Under a conservatorship the ward retains their rights such as the right to vote, to marry, or to write a will. The Conservator appointed by the Court must act in the ward's best interests, and is responsible to the court and must make an annual accounting. Upon being appointed, the Conservator must take possession of, protect, and preserve the ward's property. The Conservator must invest the ward's property prudently and account for it. The Conservator's responsibilities and powers may be limited by the court order.

Within 90 days after appointment, a complete inventory must be filed by the conservator with the court. This inventory should include any property in the conservator's possession or of which there is knowledge. The conservator must manage the ward's money and pay all the ward's debts and taxes and the expenses of the guardianship. Annual reports to the court are required. In the annual report, the conservator must give the court a full and correct account of the receipts and disbursements of all the ward's property and a statement of the ward's remaining assets.

**Guardianship** A guardianship is a court-ordered protective arrangement for a person (called the ward) who has been found by Court to be incapacitated and in need of someone to oversee his or her personal care and decision-making to protect the ward's health and safety. A guardianship may be used only as is necessary to promote and protect the well-being of the incapacitated person.

Montana law defines an incapacitated person as "anyone who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause to the extent he or she lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his/her person." The Court may consider any evidence which pertains to the issue of capacity. Normally the best evidence is the opinion of a qualified doctor who has personally examined the potential ward.

In addition to the full guardianship, the Court may order a limited guardianship instead. A full guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his minor child. A limited guardian of an incapacitated person has only those powers and duties that are specifically given to the guardian by the Court.

## **QUESTIONS and ANSWERS**

### **What is a guardian?**

A guardian is a person, institution, or agency appointed by a court to manage the affairs of another, called a ward. The guardian may manage person and/or the estate matters. Each state has specific laws, which govern guardianship proceedings and the guardian's activities. States also separate guardianship for minors and for adults with disabilities in the law. Your local court will be able to direct you to the divisions, which oversee adult guardianship and/or minor guardianships.

### **Who may have a guardian appointed to manage his/her affairs?**

In order to have a guardian appointed a person must be demonstrated by a preponderance of the evidence to lack the capacity to make or communicate rational decisions concerning personal or financial matters. The law presumes that an adult 18 years of age or older is capable of managing, or has the capacity to manage, his/her own affairs. There must also be cause of the lack of capacity identified. Mental illness, developmental disability, physical incapacity, chronic intoxication, and advanced age can be the cause.

### **How is it determined that a person may need a guardian?**

Normally a person's actions harming their own safety or welfare lead to concerns that

the person may need a guardian. Anyone may file a Petition in Court to have a guardian appointed. The Montana Adult Protective Services agency files for guardianships in order to protect adults who may be incapacitated.

### **Who can act as a guardian?**

The guardian must be over the age of 18 and must be capable of caring for the ward. Individuals have priority for appointment as guardian in-the following order: 1) The spouse of the incapacitated person; 2) An adult child of the incapacitated person; 3) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent; 4) Any relative of the incapacitated person with whom he has resided for more than 6-months prior to the filing of the petition; 5) A relative or friend who has demonstrated a sincere, longstanding interest in the welfare of the incapacitated person; 6) A private association or nonprofit corporation with a guardianship program for incapacitated persons, a member of such private association or nonprofit corporation; 7) A person nominated by the person who is caring for him or paying benefits to him.

The parent of an unmarried incapacitated person may appoint a guardian of the incapacitated person in his or her will or other writing that is signed by the parent and attested by at least two witnesses. The spouse of a married incapacitated person may appoint a guardian of the incapacitated person by will or other writing signed by the spouse and attested by at least two witnesses. The appointment of a guardian by a spouse has priority over an appointment by a parent.

### **Who makes the decision to establish a guardianship and/or conservatorship?**

Upon the filing of a Guardianship Petition, the Court decides whether to appoint a guardian and who to appoint. The Court also decides how much authority to give to the guardian. The guardianship should be limited to meet the specific needs of the ward.

### **Should I avoid a guardianship and/or conservatorship?**

Guardianship should be a last resort. When a guardian is appointed, you lose your right to make basic decisions about your life and property. The proceeding will be expensive and is emotionally difficult.

### **What is expected of me if I serve as a guardian/conservator?**

If you are appointed as a guardian and/or conservator, the court's order will tell you what decisions you are allowed to make. You may have just a few powers or need

to make most decisions on behalf of your ward. You are required to make decisions and act in the ward's best interest. You must try to make choices based on the ward's values and to involve the ward in making decisions whenever possible. What you can do depends on the court order and state law, but if you have authority over property (i.e. as Conservator) you will at least need to:

- Find and protect the ward's assets
- Set up separate accounts with the ward's funds
- Spend the ward's money only for the ward's care and needs
- Keep detailed records of all expenditures
- Keep the ward's property in good repair and insured
- Carefully invest the ward's resources
- File inventories and accountings with the court
- Get directions from the court before taking major actions

If you have authority over your ward's personal affairs (i.e. as Guardian), the list of responsibilities can be quite long, depending on your ward's needs and the court's order. You may need to:

- Make sure the ward is living in the most appropriate location
- Arrange for caregivers, social activities, transportation
- Consent to medical treatment such as surgeries or medications
- Supervise hygiene, meals, and clothing
- Provide for any physical, speech, or occupational therapies
- Frequently visit the ward and try to improve the ward's quality of life
- Report to the court on the care you are providing

### **Can guardianship be used in an emergency?**

Yes, there is the mechanism for an emergency appointment of a guardian for a specific purpose. They are usually time-limited and not renewable without a full guardianship proceeding. There is usually a cursory hearing about the specific issue and a guardian's

authority is only in the areas of the issue presented. Usually this is not a full finding of incapacity, and a full hearing on the guardianship must be scheduled or the emergency/temporary guardianship expires.

### **Does guardianship ever end?**

Guardianship is normally a long-term relationship. The court may modify, revoke, or terminate the guardianship if the ward's ability to make and communicate decisions is demonstrated to the court.

### **Are there alternatives to guardianship?**

Guardianship is a highly intrusive form of advocacy and should be used only as a last resort when all other alternatives have been examined. Some of the alternatives to guardianship may be Powers of Attorney for health care or financial management, Living Wills, trust, case/care management services, Representative Payee and Health Care Surrogate acts. Individuals may get additional information from the local bar association, and local social service agencies, Legal Services Developer with Aging Services Bureau Senior & Long Term Care.

### **What is the procedure for pursuing a Guardianship?**

The incapacitated person or any person interested in his welfare, including the county attorney, may petition the district court for a finding of incapacity and appointment of a guardian. Upon filing the petition the court will set a date for a hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of his own choice or the court may, in the interest of justice appoint an appropriate official or attorney to represent him in the proceeding who will serve as a guardian ad litem (a person who is appointed by the court to represent a ward in legal proceedings).

The person alleged to be incapacitated will be examined by a physician appointed by the court. The physician will submit his report in writing to the court. A visitor, who is appointed by the court, will interview the examining physician. The visitor will also interview the person who filed the petition and the person who is nominated to serve as guardian and will visit the residence of and the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made. The visitor will then submit his report in writing to the court.

The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon his condition. He is entitled to be

represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and is entitled to a trial by jury. However, the issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or his counsel so requests.

### **What rights of mine might be affected?**

A good guardian will take into account the wishes and desires of the ward when making decisions about residence, medical treatments, and end-of life decisions. The guardianship should affect only those rights that the proposed ward is incapable of handling.

### **Can someone file a Petition appointing themselves my guardian without my knowledge and consent?**

Because establishing guardianship is a legal process that involves the removal of the individual's rights, there are many procedural protections established by the law. They include:

- Notice to the individual of all proceedings.
- Representation of the individual by counsel.
- Attendance of the individual at all hearings/court proceedings.
- Ability of the individual to compel, confront and cross examine all witnesses.
- Allowance of the individual to present evidence.
- Appeal of the individual to the determination of the court.
- Presentation of a clear and convincing standard of proof.
- The right of the individual to a jury trial.

In any type of guardianship the court may limit the guardian's authority. The guiding principle in all guardianship is that of least intrusive measures to assure as much autonomy as possible. The guardian's authority is defined by the court and the guardian may not operate outside that authority. A guardian may be a family member or friend or a public or private entity appointed by the court.

### **What are the rights of the ward?**

In general, the ward keeps all legal and civil rights guaranteed to all residents under the states' and the United States' Constitution, **except those rights which the court grants to the guardian.**

The court should specifically state which rights it is taking from the ward. The ward keeps all rights that the court has not specifically given to the guardian. The ward,

however, has the right to the **least restrictive** guardianship suitable to his or her needs and conditions. The guardian also has the affirmative duty to advise the ward of his or her rights and to attempt to maximize the ward's self reliance and independence. These rights include, but are not limited to:

1. The right to be treated with dignity and respect.
2. The right to privacy, which includes the right to privacy of the body, and the right to private, and uncensored communication with others by mail, telephone, or personal visits.
3. The right to exercise control over all aspects of life that the court has not delegated to the guardian.
4. The right to appropriate services suited to the ward's needs and conditions, including mental health services.
5. The right to have the guardian consider the ward's personal desires, preferences, and opinions.
6. The right to safe, sanitary, and humane living conditions within the least restrictive environment that meets the ward's needs.
7. The right to procreate.
8. The right to marry.
9. The right to equal treatment under the law, regardless of race, religion, creed, sex, age, marital status, sexual orientation, or political affiliations.
10. The right to have explanations of any medical procedures or treatment. This includes information about the benefits, risks, and side effects of the treatment, and any alternative procedures or medications available.
11. The right to have personal information kept confidential. This may include withholding certain information the ward may not want his or her family to know. The guardian may have to provide personal information to apply for benefits or in emergency situations where the ward or others may be in danger, or if the information is required by law to be shared with agencies or health departments. Personal information may also be contained in the reports the guardian makes to the court, and which may be available for others to see.
12. The right to review personal records, including medical, financial, and treatment records.
13. The right to speak privately with an attorney, ombudsman, or other advocate.



14. The right to petition the court to modify or terminate the guardianship. This includes the right to meet privately with an attorney or other advocate to assist with this legal procedure.

15. The right to bring a grievance against the guardian, request the court to review the guardian's actions, request removal and replacement of the guardian, or request that the court restore rights if it can be shown that the ward has regained capacity to make some or all decisions. The guardian also has a responsibility to request that the ward's rights be restored when there is evidence that the ward has regained capacity.

### **What is a temporary Guardianship?**

If an incapacitated person has no guardian and an emergency exists, the court may appoint a temporary guardian without first holding a complete guardianship hearing. If a temporary guardian is appointed in such a case, a complete hearing following full notice to all interested persons must be held within six months to determine if a permanent guardian should be appointed.

### **When does a Guardianship terminate?**

The authority and responsibility of a guardian for an incapacitated person terminate upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon the removal or resignation of the guardian. The incapacitated person may file a written objection to the appointment of the parental or spousal appointment of guardian. The appointment is then terminated. Regardless of the objection, however, the court may then hold a hearing relative to the ward's incapacity and may appoint the parental or spousal nominee or any other suitable person upon a finding of incapacity. If, the ward, or any person interested in the ward's welfare, petitions the court to remove a guardian, the court will hold a hearing and may remove the guardian if it is in the best interests of the ward. The court may also accept the guardian's resignation after holding a hearing when petitioned to do so by the guardian.